Filed 3/6/19 Hodge v. Home Depot U.S.A., Inc. CA2/1

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

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| RAMSES HODGE, a Minor, etc., et al.,<br><br>Plaintiffs and Appellants,<br><br>v.<br><br>HOME DEPOT U.S.A., INC., et al.<br><br>Defendants and Respondents. | B281345<br><br>(Los Angeles County Super. Ct. No. BC570453) |

APPEAL from a judgment of the Superior Court of Los Angeles County, Joanne B. O' Donnell, Judge. (Retired Judge of the L.A. Sup. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed in part; dismissed in part.

Channel Law Group and Charles J. McLurkin for Plaintiffs and Appellants.

McCune and Harber, Stephen M. Harber and David M. Gillen for Defendant and Respondent Home Depot U.S.A., Inc.

Michael N. Feuer, City Attorney, Blithe S. Bock, Assistant City Attorney, and Matthew A. Scherb, Deputy City Attorney, for Defendant and Respondent City of Los Angeles.

Berman Berman Berman Schneider & Lowary, Mark Lowary, Howard Smith and Brianna Wilson for Defendant and Respondent IDEPSCA—Institute of Popular Education.

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While driving a commercial truck, Concepcion Soria (Soria) made a sudden right turn into a Home Depot parking lot, hitting Ramses Hodge (Hodge). Hodge ultimately sued Soria, Home Depot, owner of the parking lot, the Institute of Popular Education (IDEPSCA)[1] which operated a day laborer hiring center within the parking lot, and the City of Los Angeles (the City), which contracted with IDEPSCA to operate the center. Soria settled with Hodge. However, Home Depot and IDEPSCA filed demurrers to Hodge's complaint. The City filed a motion for judgment on the pleadings. The trial court sustained Home Depot's and IDEPSCA's demurrers and granted the City's motion. Hodge challenges on appeal various orders and judgments entered during the course of the proceedings. We affirm the judgment awarding costs to Home Depot, the only judgment from which an appeal was taken. We dismiss the remainder of his appeal.

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[1] This acronym is based on the organization's name in Spanish—Instituto De Educacion Popular del Sur de California.

## BACKGROUND

On July 31, 2014, at approximately 6:30 a.m., Soria made a sudden right turn with his 1994 Ford L8000 commercial truck into a Cypress Park Home Depot parking lot, colliding with Hodge, who was riding a bicycle.[2] A subsequent investigation by the police concluded that Soria had caused the accident by making an unsafe right turn in violation of the Vehicle Code.

On the morning of the accident, Soria intended to seek work as a truck driver at the day laborer hiring center located in the Home Depot parking lot. IDEPSCA operated the hiring center as a contractor with the City. With federal funding, the City provides hiring centers where people participating in the casual labor force can safely congregate in order to solicit employment from those seeking day laborers.

After the accident, Hodge filed a claim for damages with the City. Hodge stated that his injury occurred when Soria's truck "made an abrupt and illegal right turn" into the Home Depot parking lot "in violation of [the] Vehicle Code." According to Hodge, the City was responsible for the accident because of its affiliation with the day labor program and its alleged authorization of commercial trucks at the program's location. The claim did not mention any defect or dangerous condition on the property.

The City rejected Hodge's claim for damages. Hodge then sued Soria, IDEPSCA, the City, and Home Depot in a two-count

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[2] On demurrer, "[w]e assume the truth of the properly pleaded factual allegations . . . ." (*Sarun v. Dignity Health* (2014) 232 Cal.App.4th 1159, 1165.) Thus, we look to Hodge's second amended complaint for a summary of the alleged facts.

complaint for negligence. The first cause of action named Soria as the sole defendant and alleged motor vehicle negligence. As noted above, Soria settled with Hodge.

The second cause of action named IDEPSCA, the City, and Home Depot as defendants and alleged general and premises liability based on negligence. The complaint did not allege that there was a dangerous condition on Home Depot's property which affected Soria's driving, i.e., was a causative factor in the accident.

Home Depot filed a demurrer to the complaint. On June 16, 2016, the trial court sustained the demurrer without leave to amend and entered a signed order dismissing Home Depot from the action. Hodge did not appeal the order of dismissal, however. (*Ward v. Tilly's, Inc.* (Feb. 4, 2019) ___ Cal.App.5th ___, ___, fn. 3 [2019 WL 421743 *3] [written order of dismissal signed by the court constitutes an appealable judgment]; see Code Civ. Proc., § 581d.)

Home Depot filed its memorandum of costs seeking an award of $6,761.46 from Hodge on June 29. On September 22, the court awarded Home Depot costs in the amount of $4,641.33. On January 3, 2017, the court entered judgment with respect to this award, with notice of entry of judgment filed and served on January 11, 2017.

IDEPSCA also filed a demurrer to the complaint. After concluding that IDEPSCA owed no duty to Hodge and could not be held vicariously liable for Soria's negligent driving, the trial court sustained the demurrer without leave to amend. On August 16, 2016, the trial court entered judgment for IDEPSCA. Hodge was served with notice of entry of this particular judgment on September 21, 2016. Thereafter, on January 18, 2017, Hodge

and IDEPSCA filed a stipulation for an award of costs to IDEPSCA as the prevailing party. This stipulation specified that "[b]y stipulating to [an] agreed amount of the Cost Bill, [Hodge] does not waive his appellate rights to assert that IDEPSCA should not have been the prevailing party." Hodge did not appeal the judgment in favor of IDEPSCA. In a stipulation filed with this court on July 27, 2017, Hodge confirmed he would not be appealing the judgment.

The City then moved for judgment on the pleadings. Like IDEPSCA, the City argued that Hodge had failed to state a claim for negligence. The City also argued that Hodge's negligence claim could not be based on any alleged dangerous condition of the property under Government Code section 835, because Hodge did not include such a claim in his pre-suit claim for damages and did not identify an actionable dangerous condition in his complaint.[3]

On November 14, 2016, in light of the trial court's judgment for IDEPSCA, the City and Hodge filed a written

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[3] Government Code section 835 provides: "[A] public entity is liable for injury caused by a dangerous condition of its property if the plaintiff establishes that the property was in a dangerous condition at the time of the injury, that the injury was proximately caused by the dangerous condition, that the dangerous condition created a reasonably foreseeable risk of the kind of injury which was incurred, and that either: [¶] (a) A negligent or wrongful act or omission of an employee of the public entity within the scope of his employment created the dangerous condition; or [¶] (b) The public entity had actual or constructive notice of the dangerous condition . . . a sufficient time prior to the injury to have taken measures to protect against the dangerous condition."

stipulation with the court addressing the City's then-pending motion for judgment on the pleadings. In their stipulation, the parties agreed that Hodge's negligence "theory of liability for IDEPSCA is the same for the City in that [Hodge] alleges that the City contracted IDEPSCA to operate the City's Day Labor Program in the Cypress Park section of Los Angeles and therefore [Hodge] contends IDEPSCA's acts are imputed to the City . . . ." Hodge conceded that his opposition to the City's motion was "essentially the same" as his opposition to IDEPSCA's demurrer. The parties also agreed that the trial court would likely "utilize the same analysis" and grant the City's motion. Hodge ultimately stipulated that the trial court could grant the City's motion for judgment on the pleadings based on the same analysis the court employed when granting IDEPSCA's demurrer, but he did "not waive his right to appeal the [c]ourt's granting the City's Motion for Judgment on the Pleadings without leave to amend."

Based on the parties' stipulation, the trial court granted the City's motion for judgment on the pleadings on November 17, 2016. The trial court did not enter a separate order of dismissal or judgment with respect to this ruling. On May 30, 2017, the trial court entered a minute order stating: "The entire action is dismissed with prejudice per the settlement agreement."

Hodge filed a notice of appeal on March 10, 2017. The notice specified that Hodge appealed from the order entered on "JANUARY 3, 2017 (NOTICE 1/11/17)." Checked boxes below identified this as a judgment of dismissal after an order sustaining a demurrer and an order after judgment under Code of Civil Procedure section 904.1, subdivision (a)(2).

The notice of appeal did not mention the June 16, 2016 order dismissing Home Depot's demurrer or the August 16, 2016 judgment in favor of IDEPSCA. Nor did the notice of appeal reference the trial court's November 17, 2016 order granting the City's motion for judgment on the pleadings.

## DISCUSSION

### I. IDEPSCA

Judgment in favor of IDEPSCA was entered on August 16, 2016, and Hodge was served with notice of entry of judgment on September 21, 2016. IDEPSCA filed a memorandum of costs on September 23, and on November 7, 2016, Hodge and IDEPSCA stipulated to the amount of costs to be awarded to IDEPSCA. On January 18, 2017, the parties' stipulation was filed with the trial court. On March 10, 2017, Hodge filed his notice of appeal with this court. It is undisputed that Hodge's appeal is untimely as to the judgment.[4]

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[4] Under California Rules of Court, rule 8.104(a)(1), "a notice of appeal must be filed on or before the earliest of: [¶] (A) 60 days after the superior court clerk serves on the party filing the notice of appeal a document entitled 'Notice of Entry' of judgment or a filed-endorsed copy of the judgment, showing the date either was served; [¶] (B) 60 days after the party filing the notice of appeal serves or is served by a party with a document entitled 'Notice of Entry' of judgment or a filed-endorsed copy of the judgment, accompanied by proof of service; or [¶] (C) 180 days after entry of judgment." Here, Hodge was served with notice of entry of judgment on September 21, 2016. Thus, a notice of appeal as to this judgment had to be filed by November 20, 2016.

The subsequent stipulation as to an award of costs was entered with Hodge's consent. Therefore, he is not an aggrieved party with respect to the award and cannot appeal it. (*Papadakis v. Zelis* (1991) 230 Cal.App.3d 1385, 1387-1388.) Although Hodge reserved his right to claim on appeal "that IDEPSCA should not have been the prevailing party," it was the previous judgment which was the basis for the determination that IDEPSCA was the prevailing party. The subsequent cost award was a mere formality, with the only issue addressed being the amount of costs, not the right to costs. In order to address the determination that IDEPSCA was the prevailing party, Hodge would have had to timely appeal the judgment. He failed to do so. We thus must dismiss any purported appeal related to IDEPSCA.

**II. The City**

Hodge's notice of appeal did not identify any judgment or order involving the City. It identified only the January 3, 2017 judgment awarding costs to Home Depot.

The trial court order which Hodge presumably wants this court to review is the November 17, 2016 order granting the City's motion for judgment on the pleadings. That order is not appealable. (See *Ellerbee v. County of Los Angeles* (2010) 187 Cal.App.4th 1206, 1212 [appeal from order granting motion for judgment on the pleadings must be taken from judgment itself, not ruling on the motion].)

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Hodge did not file his notice of appeal until March 10, 2017, making the notice untimely as to IDEPSCA's judgment.

Even assuming the May 30, 2017 minute order dismissing the action was appealable (but see Code Civ. Proc., § 581d; *Ward v. Tilly's, Inc.*, *supra*, ___ Cal.App.5th at p. ___, fn. 3 [2019 WL 421743 *3]), Hodge asks that the March 10, 2017 notice of appeal be deemed " 'premature but valid' " regarding the May 30 order. We cannot construe Hodge's notice of appeal to encompass the order. "While a notice of appeal must be liberally construed, it is the notice of appeal that defines the scope of the appeal by identifying the particular judgment or order being appealed. [Citations.]" (*Morton v. Wagner* (2007) 156 Cal.App.4th 963, 967; see Cal. Rules of Court, rule 8.100(a)(2).) The notice of appeal identified the January 3, 2017 judgment of dismissal after an order sustaining a demurrer as the judgment appealed from; we cannot construe it to refer to the later order of dismissal following an order granting a motion for judgment on the pleadings. (See *Baker v. Castaldi* (2015) 235 Cal.App.4th 218, 225 ["Appellants would have us construe the notices of appeal, which identify one order, as a premature appeal from an entirely different order entered months later . . . . But it is well 'beyond liberal construction' to view an appeal from one order as an appeal from a 'further and different order.' "].)

Hodge argues that his notice of appeal cannot be deemed defective because the City "never presented the trial court with a proposed judgment to be entered." Had Hodge wanted to challenge the order granting the City's motion for judgment on the pleadings, he should have taken steps to have an appealable judgment entered in the trial court. (See, e.g., *Tepper v. Wilkins* (2017) 10 Cal.App.5th 1198, 1203 [after Court of Appeal advised appellant that order sustaining demurrer was not appealable, she obtained an order dismissing her complaint with prejudice].)

Instead, he entered into a settlement agreement to dismiss the action with prejudice. "By failing to obtain a properly appealable [judgment or] order, and then by divesting us of whatever jurisdiction we might have had by [agreeing to] dismiss[al of] the entire action, [Hodge] has left us with no alternative but to dismiss his appeal . . . ." (*Yancey v. Fink* (1991) 226 Cal.App.3d 1334, 1343.)

Hodge also maintains that the City "was well aware" that he was proceeding with an appeal because he reserved the right to appeal in the parties' November 14, 2016 stipulation. Not so. Had Hodge *actually* appealed the order granting the City's motion for judgment on the pleadings, or at least filed a notice of appeal reflecting that decision in some way, then the City would have been "well aware" Hodge was appealing that particular order. Despite Hodge's argument to the contrary, that the City was served with the notice of appeal that only identified the January 3, 2017 Home Depot order did not put the City on notice that Hodge was appealing any order or judgment in favor of the City.

Given that Hodge failed to file a notice of appeal identifying any of the orders resolving his case against the City, we must dismiss his purported appeal regarding the City.

## III. Home Depot

With respect to Home Depot, the trial court entered an appealable order of dismissal on June 16, 2016 and an appealable judgment awarding costs on January 3, 2017. Hodge failed to appeal the order of dismissal. While he appealed the judgment awarding costs, he failed to raise any claim of error with respect

to that judgment in his opening brief, thus forfeiting any challenge to that judgment.

A. *The June 16, 2016 Order of Dismissal*

A notice of appeal must be filed on or before the "180[th] day[] after entry of judgment." (Cal. Rules of Court, rule 8.104(a)(1)(C).) The 180th day after June 16, 2016 was December 13, 2016. Hodge did not file his notice of appeal until March 10, 2017—267 days after entry of the order of dismissal. Therefore, any purported appeal of that order was untimely.

However, Hodge contends we have jurisdiction in this matter because the June 16, 2016 order was not a judgment or appealable order for purposes of triggering the notice of appeal. He is mistaken.

It is true, as Hodge argues, that " '[a]n order sustaining a demurrer without leave to amend is not appealable, and an appeal is proper only after entry of a dismissal on such an order.' [Citation.]" (*Thompson v. Ioane* (2017) 11 Cal.App.5th 1180, 1189.) However, the order here also included an order of dismissal, which was signed by the trial court. As previously stated, a written order of dismissal signed by the court constitutes an appealable judgment. (Code Civ. Proc., § 581d; *Ward v. Tilly's, Inc.*, *supra*, ___ Cal.App.5th at p. ___, fn. 3 [2019 WL 421743 *3].) Even if the notice of appeal could be construed to encompass the order of dismissal, it was untimely and any purported appeal must be dismissed. (*Ellis v. Ellis* (2015) 235 Cal.App.4th 837, 842.)

B. *The January 3, 2017 Judgment*

On appeal, Hodge challenges only the propriety of the June 16, 2016 order. He raises no claim of error regarding the January 3, 2017 judgment. Accordingly, any such claim is forfeited. (*Sierra Palms Homeowners Assn. v. Metro Gold Line Foothill Extension Construction Authority* (2018) 19 Cal.App.5th 1127, 1136.)

## DISPOSITION

The January 3, 2017 judgment awarding costs to Home Depot is affirmed. The purported appeal is dismissed with respect to IDEPSCA, the City, and the June 16, 2016 order in favor of Home Depot. The parties are to bear their own costs on appeal.

NOT TO BE PUBLISHED

JOHNSON, Acting P. J.

We concur:

BENDIX, J. CURREY, J.*

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* Associate Justice of the Court of Appeal, Second Appellate District, Division Four, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.